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SURFACE TRANSPORTATION BOARD

DECISION

Docket No. NOR 42159

CENTRAL VALLEY AG GRINDING, INC. AND CENTRAL VALLEY AG TRANSPORT INC.
v.
MODESTO AND EMPIRE TRACTION COMPANY

Digest:[1] Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. (collectively, CVAG) filed an unreasonable practice complaint against Modesto and Empire Traction Company (MET). This decision denies MET's motion to dismiss CVAG's complaint, sets forth a procedural schedule to govern the complaint proceeding, and initiates Board-sponsored mediation.

Decided: July 24, 2018

On May 1, 2018, Central Valley Ag Grinding, Inc. and Central Valley Ag Transport Inc. (collectively, CVAG) filed an unreasonable practice complaint against Modesto and Empire Traction Company (MET). CVAG seeks a determination from the Board that certain tariff terms and practices of MET constitute a violation of MET's common carrier service obligations and an unreasonable and unlawful practice in violation of 49 U.S.C. §§ 11101 and 10702(2). CVAG also seeks a Board determination that MET has violated its obligations to interchange traffic and engage in continuous carriage of freight under 49 U.S.C. § 10744. In addition, CVAG seeks injunctive relief and monetary damages under 49 U.S.C. § 11704(b).[2]

On May 31, 2018, MET filed a motion to dismiss this proceeding,[3] to which CVAG replied on June 20, 2018. On June 19, 2018, the parties jointly filed a request for the Board to adopt a proposed procedural schedule to govern this proceeding. On July 13, 2018, the parties jointly filed a request that the Board commence voluntary mediation. For the reasons discussed

[1] The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. See Policy Statement on Plain Language Digests in Decision, EP 696 (STB served Sept. 2, 2010).

[2] By decision served June 12, 2018 (June 2018 Decision), the Board granted CVAG's request for a preliminary injunction under 49 U.S.C. § 1321(b)(4) to enjoin MET from requiring prepayment as a condition for interchange and switching services and directed MET to interchange and switch full unit trains bound for the Modesto facility and to provide otherwise reasonable service.

[3] Concurrent with its motion, MET filed its answer to CVAG's complaint.

below, the Board will deny MET's motion to dismiss the complaint proceeding, set forth a procedural schedule to govern this proceeding, and initiate Board-sponsored mediation.

BACKGROUND

CVAG is a full-service transloading company in Modesto, Cal., that receives by rail, stores, and transloads a variety of agricultural commodities, the vast majority of which are agricultural feed commodities destined for California dairy farmers. CVAG's Modesto facility is served exclusively by MET, a shortline common carrier that interchanges traffic of connecting Class I carriers, BNSF Railway Company (BNSF) and Union Pacific Railroad Company (UP), for delivery to the Modesto facility. MET also owns the industrial park where the Modesto facility is located and leases the property underlying the Modesto facility to CVAG.

CVAG states that most of the animal feed ingredients shipped by MET and received at the Modesto facility are shipped in 100-car unit train service. According to CVAG, shipments of such livestock feed must be shipped in trains of 90-110 railcars because of high-volume demands, low margins, and rate incentives for such service, as well as the fact that UP and BNSF tariffs require trains of this size. (CVAG Compl. ¶ 30.)

CVAG states that MET has actively encouraged the growth of CVAG's business. Almost a decade ago, according to CVAG, MET designed and built a 110-car loop track for the exclusive use of CVAG. CVAG states that the loop track is in full compliance with UP and BNSF's unit train unloading facility requirements. (Id. ¶ 21.) In return for its property investments, CVAG states that MET has demanded and obtained through lease agreements escalating minimum volume contractual requirements, which have tripled over the past seven years. (Id. at ¶ 22.) From June 2009 through February 2018, MET conducted all train activities in support of unloading unit trains for CVAG, cutting and reassembling certain unit trains before returning them to the Class I carriers. (Id. at ¶¶ 33, 34.) CVAG states that, during that time, no accessorial tariff charge assessments or prepayment demands were made for any of these services. (Id. at ¶ 35.)

CVAG claims that, in 2017, MET "began taking affirmative steps specifically designed to deprive CVAG of its ability" to remain at its Modesto facility. (Id. at ¶ 36.) In June 2017, CVAG exercised its option to extend its lease, but MET would not agree to an extension of CVAG's lease arrangements. (Id. at ¶ 36.) The parties' lease and property rights dispute is currently pending before a California state court.[4]

CVAG states that, shortly after MET provided CVAG written assurances that MET would not interfere with rail delivery service, MET instituted a series of changes pertaining to

[4] Cent. Valley Ag Grinding, Inc. v. Modesto & Empire Traction Co., No. 2028642 (Stanislaus Cty., Cal. Superior Ct. filed Jan. 19, 2018).

service, access, and other tariff provisions and fees for CVAG's Modesto facility. (Id. at ¶ 38.) In February 2018, MET informed CVAG that CVAG would have to perform its own train services in support of unit train unloading. (Id. at ¶ 39.) According to CVAG, MET then restricted CVAG's access to the receiving loop tracks by placing restrictive "derails" on three tracks designated for CVAG's use in receiving trains and denied CVAG access to certain trackage used to support CVAG's unit train service. (Id. at ¶ 40.) CVAG states that these restrictions have limited CVAG's unloading capacity and ability to receive unit trains without requiring additional switching services by MET. (Id. at ¶¶ 41, 42.) According to CVAG, MET then imposed a series of new fees, including accessorial and demurrage fees, specific to CVAG's Modesto facility, and since March 2018 has required CVAG to prepay up to $50,000 per train as a condition of interchange and switching services for unit trains exceeding specified car lengths. (Id. at ¶ 46.)

CVAG states that it objected to and protested each invoice, payment, and prepay demand and that MET's tariffs and demands were targeted specifically at CVAG. (Id. at ¶ 45, 50.) In lieu of a full prepayment, CVAG states that it offered, and remains willing to pay, $10,000 per train as a form of security, but MET repeatedly rejected this approach. (Id. at ¶¶ 62 ,63.) In the absence of full prepayments by CVAG, MET ceased unit train delivery to CVAG for shipments exceeding specified train lengths. (Id. at ¶¶ 66, 68.)[5]

In response to MET's actions, CVAG filed the formal complaint that is the subject of this proceeding, to which MET filed a motion to dismiss the complaint. MET argues that CVAG's complaint should be dismissed because the complaint is improperly pleaded as an unreasonable practice complaint. MET asserts that CVAG is challenging the level of MET's accessorial charges and is thus effectively bringing a complaint alleging unreasonable rates, not unreasonable practices. MET further asserts that the Board must dismiss CVAG's complaint due to the absence of a genuine service dispute or any violation of applicable law. MET states that traffic is moving and will continue to move to the Modesto facility and that it is willing to lift its restriction on longer unit trains if CVAG agrees to pay the applicable charges for switching. Accordingly, MET claims that there is no violation of its common carrier obligation (§ 11101) and no arrangement to prevent the continuous carriage of freight (§ 10744). MET further argues that there is, at the very least, an open question as to whether the Board has jurisdiction over

[5] As noted, the Board has since ordered MET to interchange and switch full unit trains bound for the Modesto facility and enjoined MET from requiring prepayment as a condition for these services. June 2018 Decision, slip op. at 7 (granting CVAG's request for preliminary injunction).

MET's provision of accessorial switching services to a non-shipper such as CVAG.[6] It similarly claims that, as a non-shipper, CVAG lacks standing to complain about MET's participation in line haul service or the particulars of MET's provision of such services.

In reply, CVAG asserts that it has provided multiple, detailed grounds for finding that MET's practices and tariffs are unlawful and that MET has failed to meet the Board's high threshold for motions to dismiss. CVAG further argues that MET's challenges to the Board's jurisdiction and CVAG's standing are unfounded.

As noted, the parties also jointly filed a request for the Board to adopt a proposed procedural schedule to govern this proceeding, as well as a joint request that the Board commence voluntary mediation.

DISCUSSION AND CONCLUSIONS

Motion to Dismiss. The Board may dismiss a complaint if it "does not state reasonable grounds for investigation and action." 49 U.S.C. § 11701(b). Motions to dismiss are generally disfavored. While reviewing a motion to dismiss, the Board will view the alleged facts in a light favorable to the complainant. Consumers Energy Co. v. CSX Transp., Inc., NOR 42142, slip op. at 1 (STB served June 15, 2015); Montana v. BNSF Ry., NOR 42124, slip op. at 3 (STB served Feb. 16, 2011).

The Board finds that CVAG's complaint raises allegations that form a reasonable basis for investigation and action. Contrary to MET's assertion that CVAG's complaint effectively challenges unreasonable rates rather than practices, CVAG's complaint pertains to MET's practice of assessing accessorial charges, in addition to its implementation of certain tariff provisions and conditions of service, including prepayment demands, that allegedly impact CVAG's ability to receive unit train service at its Modesto facility. (CVAG Compl. 1-2.)[7] The

[6] The shippers of the commodities received by CVAG pay all of the line-haul freight rates, including any and all of those received by MET as a handling line carrier for UP and BNSF. The shippers that arrange for the transportation and pay the freight bills for the railroad shipments to CVAG's Modesto facility are mainly large regional and national agribusinesses, including Gavilon Ingredients, LLC, Archer Daniels Midland Company, JD Heiskell, and A.L. Gilbert Company. (CVAG Compl. ¶ 26.)

[7] The mere fact that a dispute involves a rate does not make it an unreasonable rate challenge. Cf., N. Am. Freight Car Assoc. v. Union Pac. R.R., NOR 42119 (STB served Mar. 12, 2015) (determining whether a $600 surcharge assessed by a rail carrier against shippers that fail to remove lading residue was an unreasonable practice).

Board therefore finds that CVAG has presented an appropriate basis for an unreasonable practices complaint.

MET argues that there is no service dispute and that it has not violated any applicable laws in implementing its prepayment demands and conditions of service. MET asserts that its prepayment demands are lawful and that it is willing to lift its restriction on longer unit trains if CVAG agrees to pay the applicable charges for switching. However, whether MET's actions, including its prepayment demands, amount to an unreasonable practice in violation of applicable laws is the very question in dispute. CVAG will have to present evidence to support its claims of unlawful activity, but the Board cannot conclude at this juncture that CVAG has not raised claims that, if proved, could demonstrate a violation of 49 U.S.C. §§ 11101 and 10702(2).

Lastly, the Board finds no merit in MET's argument that the complaint should be dismissed based on a lack of jurisdiction or standing. MET questions whether the Board has jurisdiction over MET's provision of accessorial switching services to a non-shipper, but CVAG's status as a transloading company does not prevent it from bringing a complaint under 49 U.S.C. § 11701(b). Section 11701(b) does not limit the filing of complaints to shippers or parties to a linehaul tariff, as MET suggests. Under § 11701(b), any "person," not just shippers, may file a complaint with the Board concerning a violation of Subtitle IV, Part A, by a rail carrier. Moreover, MET's services clearly fall under the Board's jurisdiction "over transportation by rail carriers." 49 U.S.C. § 10501(b)(1). It is undisputed that MET is a rail carrier, and the accessorial services at issue—namely MET's switching and handling of unit train deliveries—are "rail transportation" under 49 U.S.C. § 10102(9), which include "services related to" the movement of property by rail. Thus, the Board has jurisdiction over the services at issue.

For these reasons, the Board finds no basis for dismissing CVAG's complaint. MET's motion to dismiss will be denied.

Procedural Schedule. In accordance with 49 C.F.R. § 1111.10(a), the parties have discussed procedural and discovery matters and have filed with the Board a proposed procedural schedule to govern future activities and deadlines in this case. The Board will adopt the following procedural schedule agreed to by the parties:

October 23, 2018	Discovery ends.
December 24, 2018	CVAG opening statement due.
February 20, 2019	MET reply statement due.
March 22, 2019	CVAG rebuttal statement due.

This procedural schedule provides for a 90-day discovery period, 60 days for CVAG to file its opening statement, 60 days for MET to file its reply statement, and 30 days for CVAG to file a rebuttal statement. As agreed to by the parties, if the discovery period is modified, the

deadlines will be shifted accordingly to preserve the time allotted for opening, reply, and rebuttal statements.

Board-Sponsored Mediation. By a joint motion filed on July 13, 2018, CVAG and MET have indicated a willingness to participate in Board-sponsored mediation. Accordingly, the Board will initiate meditation to resolve the dispute underlying CVAG's complaint.

The Board will not hold the proceeding in abeyance at this time. When all parties consent to mediation, it is within the Board's discretion to hold a proceeding in abeyance while mediation procedures are pursued. 49 C.F.R. § 1109.3(e). Here, the parties have indicated that CVAG has conditioned its consent to mediate on not holding the proceeding in abeyance at this time, but that CVAG has not foreclosed the possibility of revisiting the issue of abeyance at a later date. Accordingly, the proceeding will not be held in abeyance.

Within 10 days of the service date of this decision, the Chairman will appoint one or more mediators pursuant to 49 C.F.R. § 1109.3(a). Once appointed, the mediator or mediators will contact the parties to discuss ground rules and the time and location of any meetings. At least one principal of each party, who has authority to commit that party, shall participate in the mediation and be present at any session at which the mediator or mediators request(s) that the principal be present. The mediation period shall be 30 days, beginning on the date of the first mediation session. 49 C.F.R. § 1109.3(b). The parties may request to extend mediation by mutual written requests of all parties to the mediation proceeding. Id. The mediator or mediators are instructed to inform the Board when mediation has ended, with or without a resolution.

It is ordered:

1. MET's motion to dismiss is denied.

2. The parties shall comply with the procedural schedule set forth in this decision.

3. Mediation will be initiated as discussed above.

4. This decision is effective on its service date.

By the Board, Board Members Begeman and Miller.